

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5457

August 13, 2015

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Freedom of Information Request

Dear Sir or Madam:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and implementing regulations in Part 2 of Title 40 of the Code of Federal Regulations, the U.S. Chamber of Commerce ("Chamber") requests that the Environmental Protection Agency ("EPA") provide public access to the following records:

- 1) Copies of all correspondence (including but not limited to memoranda, e-mails, and letters) related to the attached April 27, 2015 memorandum with the subject header "Draft Final Rule on Definition of 'Waters of the United States,'" signed by Major General John W. Peabody. (*See* Attachment 1)
- 2) Copies of all correspondence (including but not limited to memoranda, e-mails, and letters) related to the attached May 15, 2015 memorandum with the subject header "Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of 'Waters of the United States,'" signed by Major General John W. Peabody. (*See* Attachment 2)

Please search for responsive records regardless of format, medium, or physical characteristics. Please produce records electronically in PDF or TIF format on a CD-ROM. If applicable and feasible, please produce database entries in Microsoft Excel format. Please organize and identify records by the respective law under which notices and complaints were made.

If you believe that any portion of the requested records is exempt from disclosure, the Chamber requests that you provide it with an index of those documents, as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1972). A *Vaughn* index should describe each document claimed as exempt with sufficient specificity under a precisely identified statutory exemption so as "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). Moreover, the *Vaughn* index must "describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987). *See also Kimberlin v. Department of Justice*, 139 F.3d 944, 949-50 (D.C. Cir. 1998).

William L. Kovacs

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If you believe that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt portions of records and that those non-exempt portions are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed through the document. *Mead Data Central v. Department of the Air Force*, 455 F.3d 242, 262 (D.C. Cir. 1977). Claims of non-segregability should be made with the same detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

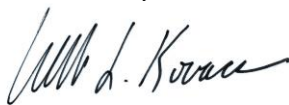
If you take the position that certain records or portions thereof are not required to be disclosed, we ask that you nonetheless consider disclosing the records on a discretionary basis. Doing so would be consistent with Attorney General Holder's March 19, 2009 FOIA guidance to federal agencies, since that guidance counsels use of a presumption of openness. Moreover, President Obama's January 21, 2009 memoranda commit the Administration to an unparalleled level of transparency and accountability. *See* Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

I would be glad to discuss any aspect of this request with you to expedite your response. In addition, please contact me at once if any further steps are required to clarify any aspect of this request for records to expedite the response.

Pursuant to the Freedom of Information Act, the Chamber agrees to pay or pre-pay reasonable charges incurred to search for and copy these documents, upon presentation of an invoice with the finished copies. If any such search and copying fees exceed \$1,000, please telephone me in advance at (202) 463-5457 for agreement to such charges.

I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read 'William L. Kovacs', written in a cursive style.

William L. Kovacs

ATTACHMENT 1



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, D.C. 20314-1000

CECW-CRO

27 April, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

SUBJECT: Draft Final Rule on Definition of "Waters of the United States"

1. As we have discussed throughout the rule-making process for "Waters of the United States" over the last several months, the Corps of Engineers has serious concerns about certain aspects of the draft final rule. On 3 April 2015, the Environmental Protection Agency delivered the draft final rule to the Office of Management and Budget to initiate the inter-agency review process by our federal partners. Once we obtained a copy of the draft final rule, I asked USACE legal and regulatory staff to review it to ascertain the extent to which Corps' concerns had been incorporated, and to conduct an analysis of the legal technical impacts of its language. That just-completed review reveals that the draft final rule continues to depart significantly from the version provided for public comment, and that the Corps' recommendations related to our most serious concerns have gone unaddressed. Specifically, the current draft final rule contradicts long-standing and well-established legal principles underlying Clean Water Act (CWA) Section 404 regulations and regulatory practices, especially the doctrine *Rapanos* Supreme Court decision. The rule's contradictions with legal principles generate multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form.

2. The preamble to the proposed rule and the draft preamble to the draft final rule state that the rulemaking has been a joint endeavor of the EPA and the Corps and that both agencies have jointly made significant findings, reached important conclusions, and stand behind the final rule. Those statements are not accurate with respect to the draft final rule, as the process followed to develop it greatly limited Corps input – a practice that has continued thus far in the inter-agency review process. Within these circumstances however, I believe that the Corps has done all that it could do to assist and support the rulemaking. The critical fact remains that the most important concerns regarding the defensibility and implementability of the draft final rule remain unaddressed, although we continue to believe, as we have previously explained, that the relatively few proposed "fixes" that the Corps has offered would resolve the problems with the draft final rule.

3. The analysis of and concerns with the draft final rule developed by the Corps professional staff are respectfully forwarded for your consideration. I have reviewed all of the attached documents and have concluded that unless the draft final rule is changed to adopt the Corps' proposed "fixes," or some reasonably close variant of them, then under the National Environmental Policy Act, the Corps would need to prepare an Environmental Impact Statement (EIS) to address the significant adverse effects on the human environment that would result from the adoption of the rule in its current form. Thank you for your consideration of the Corps' serious concerns and recommendations on this issue.

Building Strong!

JOHN W. PEABODY

Major General, U.S. Army
Deputy Commanding General
for Civil and Emergency Operations

ATTACHMENT 2



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-CO-R

15 May 15

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations,
U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN:
Edward E. Belk)

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final
Rule on Definition of "Waters of the United States"

1. References

a. *Draft Final Economic Analysis of the EPA Army Clean Water Rule*, U.S.
Environmental Protection Agency & U.S. Army Corps of Engineers, 27 April 2015

b. *Technical Support Document for the Clean Water Rule: Definition of Waters of the
United States*, U.S. Environmental Protection Agency, June 2015

2. This memorandum responds to your request for a technical analysis of the documents in
references a and b. Both documents were prepared by the U.S. Environmental Protection
Agency (EPA). With respect to EPA's Economic Analysis, the Corps provided the EPA with
raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for
aquatic resources within the span of control of the Corps' regulatory program, but the Corps had
no role in selecting or analyzing the data that EPA elected to use in drafting the attached
Economic Analysis document. Similarly, with respect to the Technical Support Document
(TSD), Corps data was also used by EPA when crafting the TSD, but the Corps also had no role
in actually performing the technical analysis or drafting the TSD.

3. The following paragraphs summarize the Corps Regulatory Program concerns and provide as
many examples as possible of what are fundamentally flawed products from a technical aspect.
In essence, certain sections of both the Economic Analysis document and the TSD are devoid of
any information about how the EPA obtained the results it has presented, rendering the
methodology and subsequent results in the documents unverifiable by the Corps.

EPA's Economic Analysis

4. The document includes the EPA's review of Corps JDs from FY 2013 and FY 2014, which
the Corps provided to the EPA for the purpose of identifying estimated changes in jurisdiction
that would occur as a result of adoption of the draft final rule. However, the attached document
fails to identify the actual draft final rule language that EPA applied in performing its review or
the methodology used by EPA in applying such language to the Corps' JDs pertaining to isolated